BEFORE TIRE IOWA CIVIL RIGHTS COMMISSION

LAURA KELLEN, Complainant,

VS.

CITY OF ALTON (PARKS DEPT.), MAYOR, CITY COUNCIL (ALTON), and CITY OF ALTON PARK BOARD, Respondents.

CP# 04-83-10468

THIS MATTER, a complaint filed by Laura Kellen (Complainant) with the Iowa Civil Rights Commission (Commission) charging City of Alton (Parks Department), Mayor, City Council (Alton), and City of Alton Park Board (Respondents) with discrimination in employment on the basis of sex came on for hearing in Des Moines, Iowa on December 8, 1987, before Ione G. Shadduck serving as Hearing Officer. Complainant was represented by Rick Autry, Assistant Attorney General. Respondents were represented by Dan W. Pluim, Attorney at Law.

ISSUE: WAS SEX A BONA FIDE OCCUPATIONAL QUALIFICATION FOR THE POSITION OF LIFEGUARD?

After having reviewed the record, testimony, exhibits and briefs of counsel the Hearing Officer makes the following findings of fact, ruling, conclusions of law, recommended decision and order.

FINDING OF FACT

1. The Complainant, Laura Kellen, timely filed verified complaint CP# 04-83-10468 with the Iowa Civil Rights Commission on April 20, 1983, alleging a violation of Iowa Code section 601A.6, discrimination in employment on the basis of sex, by City of Alton (Parks Dept.), Mayor, City Council (Alton), and City of Alton Park Board, Respondents.

2. The complaint was investigated, probable cause found, conciliation attempted but failed. Notice of Hearing was issued on March 5, 1987.

3. In 1983, the Alton swimming pool was open to the public from 1:30 p.m. until 9:00 p.m. unless fewer than 15 swimmers were at the pool at 5:30 p.m. in which case the pool was closed at 5:30 p.m. and reopened at 6:30 p.m.

4. Four full time lifeguards were hired each summer.

5. Full time lifeguards were required to have Water Safety Instruction (WSI) certification.

6. The pool usually opened on Memorial Day.

7. The Park Board consisted of 3 members. One of their duties was to recommend to the City Council specific persons to be hired as lifeguards at the pool. The City Clerk started to take written applications for the positions in January. The applications were passed on to the Park Board which reviewed the applications. Recommendations were made sometime in March.

8. In 1983, the City Council approved the Park Board recommendations at their April meeting. Approval was admitted to be a "rubber stamp* formality by the Council.

9. The Park Board did not interview applicants. It was policy and practice to rehire the full time lifeguards who worked the prior year. There was no formal evaluation policy of those lifeguards. Applicants not hired full time were placed on a substitute list.

10. In 1983, Park Board members were James Krogman, Dale Mousel and Joel Boeyink.

11. In 1982, the four full time lifeguards were: Amy Mitchell, Carla Braun, Delia Eason, and Maureen Kellen (Laura's sister).

12. Maureen Kellen did not apply for the full time lifeguard position in 1983. The other three lifeguards who worked full time in 1982 were rehired as is the practice of the Park Board. Therefore, there was one position available.

13. Laura Kellen, female, applied for the available position. Her application was dated 2/21/83. The application included information as to prior work, i.e., in 1981 she helped teach lessons at the Alton pool as a teaching assistant, and in 1982, she received her WSI and again taught lessons part time. Kellen gave Dennis Modlin, the pool manager, as a reference. [Complainant's Exhibit 5, Attachment 0]

14. Kevin Punt, male, also applied for the available position. His application was dated 2/2/83. The application indicated he did not have his WSI certification. He stated that he would be completing WSI by the end of April. However, it is noted that there was no assurance he would pass the course. Any prior experience as a substitute lifeguard at the pool was not included on his application. [Complainant's Exhibit 5, Attachment P]

15. The Park Board recommended and the City Council approved Kevin Punt as the person to be hired for the lifeguard position. It is noted that since Punt was employed in 1983, under the policy of the Park Board, he would also be hired in 1984 if he applied. He was, in fact, hired again in 1984.

16. Dennis Modlin was the pool manager from 1981 through 1984. He worked 7 days a week and 7 hours a day. His schedule included 2 hours before and 2 hours after closing. His job duties were: to take care of the guard house, the restrooms inside and outside the pool area, the sun deck and pool and determine winch guards would teach the swimming lessons. He supervised the lifeguards. Substitute lifeguards were called on a rotation basis by Modlin. The list was not in any order. He would go down the list and then try to call someone who hadn't worked before. He wanted to give everyone a chance.

The lifeguards worked half-hour shifts with a 3 guard rotation from guard to admissions. There was no employee evaluation process. Modlin stated that Kellen was as qualified as the rest and although Eason had more experience, he felt Kellen was equal in ability. He admitted that Kellen had more work experience than Punt. City Clerk Dorothy Even testified that Modlin had mentioned to her a few times that there were problems in the boys' dressing rooms. Modlin had no input in the hiring process and did not indicate any awareness of the problems in the boys' shower area. Modlin stated that he did not know why Kellen was not lured and a nude was lured. [Complainant's Exhibit 5, Attachment E]

Dale Mousel, 1983 Park Board member, remembered little of the hiring process. He thought the reason for not hiring Kellen was because they needed a boy to go in the boys' restroom; i.e., "Once in awhile we have a little ruckus in the boy's bathroom and the girls didn't want to go in." [Complainant's Exhibit 5, Attachment A]

Joel Boeyink, another 1983 Park Board member, testified that the reason Punt was hired instead of Kellen was that there had been problems in the boys' shower rooms and that one of the guards had complained. Therefore, they considered having a male guard to deal with these problems. [Complainant's Exhibit 5, Attachment B]

James Krogman, the third Park Board member in 1983, remembered little about the hiring in 1983, or the reason Kellen was not hired. When asked the reasons why they recommended hiring the four that were hired, he stated: "Well, I don't know if there were really any reasons. We hired someone (Kevin) with the same qualifications. Also, I knew Kevin personally. I didn't know Laura So I suppose that was one of the reasons. . ." Krogman admitted knowing little about Kellen's qualifications or job duties as a substitute lifeguard. [Complainant's Exhibit 5, Attachment D]

17. The 17 Lifeguard Rules do not include a rule on monitoring the showers except as to smoking. The Rules provide for enforcement of the pool rules which also provide for prohibiting smoking in the shower rooms.

18. The City Clerk testified that there were about "three of the bully groups that were snapping towels in the boys' restroom, and stuffing the little kids' clothes in the toilets, extorting money from the smaller kids. " When asked if she was familiar with the bully group, she replied: 'I know them well, yes." (Tr. p. 62-63) She further testified that she knew the names and ages of the bully group. (Tr. p. 66)

19. Boeyink, Board member, testified that Eason, a lifeguard had talked with the Board about problems in the boys' shower room area and that his impression was that she felt uncomfortable going into that area. Boeyink mentioned his concern for liability and privacy. (Tr. p. 76) Maureen Kellen (Berg) who had worked as lifeguard at the pool, testified that the problems in the boys' restroorn were "nothing major;" that these problems occurred "maybe once every couple weeks," and that the lifeguards or pool manager handled them. The lifeguards were all female. They usually knew who was causing the problems by the voices. They would call the names and the problems would stop. If the problems didn't stop, the lifeguards would threaten to

go in and that usually caused the problems to stop. If necessary they would go in after warning. Maureen said she only had to go in once in two summers.

20. Boeyink stated that if Punt had not passed his WSI, he would not have been lured and that Kellen was next on the list. (Tr. 78)

21. Boeyink did not know if the rides provided for disciplining someone who habitually violated those rules, but he supposed there could be such a rule. No complaints were received from males about guards entering the shower rooms. There was no study to determine when the problems occurred. (Tr. 79)

22. Punt's hourly wage in 1983 was $3.45 an hour. Substitutes received $2.60 an hour. Approval of hiring Punt occurred on April 10, 1983. He was 17 years old.

23. There were two males on the 1983 substitute list.

24. An average week for regular lifeguards in 1983 was 33 hours; for substitutes 18 hours; for the pool manager 7 3/4 hours a day. The pool manager was on salary and expected to work full time although the time when he worked was based on needs at the pool.

25. Kellen earned $137.80 working for the City of Alton in 1983. (Complainant's Exhibit 7) She also earned $183.75 in 1983 working for the City of Remsen. (Complainant's Exhibit 8)

RULINGS ON MOTION TO DISMISS

Respondents moved for dismissal based on the following allegations:

1. Failure of the Commission to make a "prompt investigation" pursuant to Iowa Code 601A. 15(3)(a);

2. Failure to preliminarily screen the complaint within 120 days pursuant to Iowa Code 601A. 16(6); Respondents' claim that the result has been prejudicial in that witnesses were not available and memories were not nearly as clear as they once would or could have been for those who did appear.

The motion for dismissal is denied. The reasons for denial on the alleged bases were set forth in detail in Norman W. George v. Clinton Corn Processing Co., CP# 01-74-2075 and Isial Hill v. George A. Hormel & Company, CP# 02-77-4253, IOWA CIVIL RIGHTS COMMISSION CASE REPORTS, 1980-82, and will not be repeated here. In the case at issue, Respondents offered no proof of prejudice, but only general statements that witnesses were not available. No names were given nor verification of reasonable efforts to reach unavailable witnesses.

CONCLUSIONS OF LAW

1. The complaint was timely filed, processed and the issues in the complaint are properly before the Hearing Officer and ultimately before the Commission.

2. City of Alton (Parks Dept.), City of Alton, Mayor and City Council and Park Board, City of Alton are "employers" and "persons" as defined in Iowa Code section 601A.2(2) and 601A.2(5), and are therefore subject to Iowa Code section 601A.6 and do not fall under any of the exceptions of section 601A.6(5).

3. The applicable statutory provision is as follows:

> 1. It shall be an unfair or discriminatory practice for any:
>
> > a. Person to refuse to hire, accept, register, classify, or refer for employment.... or to otherwise discriminate in employment against any applicant for employment ... because of the ... sex ... such applicant ... unless based upon the nature of the occupation...
> >
> > * * *

4. The issue in this case is whether or not male sex was a bona fide occupational qualification (BFOQ) for the position of lifeguard at the City of Alton swimming pool in the summer of 1983. Respondents claim that the primary reason for hiring Kevin Punt instead of Laura Kellen was because they wanted a male to handle the alleged problems in the boys' shower facility. The City Council only considered the names submitted by the Park Board, not the qualifications of the applicants. It was admittedly a "rubber stamp" approval. The Park Board selected the applicants on the basis of two criteria: 1) if they worked the prior summer and applied, they were hired; and, 2) if the applicant was male. They did not compare the qualifications of Punt (male) and Kellen (female). If they had hired the most qualified, they would have hired Kellen. She already had the required WSI, Punt said he was planning to get his. Kellen had 2 years prior substitute lifeguard and teaching experience, Punt only one. Krogman, a Park Board member, also stated that he knew Punt, but not Kellen and that might have been one of the reasons. Krogman is a male. Krogman was not, however, familiar with either applicant's job qualifications. The only issue remaining, therefore; is whether or not male sex was a BFOQ for the remaining position of lifeguard.

5. Proof of a BFOQ requires a showing that all or substantially all members of the excluded group will be unable safely and efficiently to perform the duties of the position, or that it is impossible or impractical to consider the persons on an individualized basis. 45B Am.Jur.2d Job Discrimination, §2019, at 469 (1986).

6. The burden of proving a BFOQ defense rests on the respondent who asserts it. ID at 471.

7. Discrimination on the basis of sex is permitted in certain instances where sex is a bona fide occupational qualification .reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. §2000e-2(e).

8. It is generally agreed that a BFOQ is an "extremely, narrow exception to the general prohibition of discrimination." Dothard v. Rawlinson, 433 U.S. 321, IS FEP10 (1977) In Dothard, the U.S. Supreme Court ruled that the use of women as guards in "contact" positions

under the existing conditions of the Alabama maximum security male penitentiaries would pose a substantial security problem and, therefore, being a male was a BFOQ. This was based on the peculiarly inhospitable environment for either sex and characterized as a "jungle atmosphere." The Courts have not been willing to extend Dothard to prisons other than those in Alabama.

9. In Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952, 955, 18 FEP 1454, 1455-56 (N.D. Iowa 1979) aff'd., 612 F.2d 1079, 21 FEP 1031 (8th Cir.), cert denied, 446 U.S. 966 (1980), the Eighth Circuit agreed with the district court's analysis using a balancing test between equality of treatment and individual evaluation of capabilities versus the requirements of public safety. In Gunther, the court declined to permit a BFOQ defense on the right to privacy since many job duties could be performed without infringing upon inmate privacy.

10. In Jatczak v. Ochburg, 540 F. Supp. 698, 28 FEP 1773 (E.D. MICH. 1982), male gender was ruled not a BFOQ for position of child care worker in a sheltered workshop for mentally ill young adults. Gender was not found to be relevant to the essential purpose of the job of teaching work skills and work behavior.

11. In the earlier case, Diaz v. Pan American World Airways, 442 F. 2d 385, 388, 3 FEP 337, 339 CERT. Denied, 404 U.S. 950 (197 1), the Court ruled that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." (Emphasis in original)

12. In Hardin v. Stynchcomb, 691 F.2d 1364, 30 FEP 624, rehearing denied, 696 F.2d 1007 (1 Ith CIR. 1982), the Eleventh Circuit ruled the same, sex was not a BFOQ entry-level deputy positions again using the essence of the business test.

13. In a case where Respondent pleads a BFOQ defense, a prima facie case of discrimination is established and it becomes the Respondent's burden to show that the sex-based requirement is a business necessity. In the case at issue, Respondent's reasons for using the BFOQ defense were given as follows:

> a. A female lifeguard, Delia Eason, had talked with the Park Board about problems in the boys' showeroom;
> b. that a Park Board member, Joel Boeyink, got the impression that Eason was uncomfortable going into the boys' shower area;
> c. Boeyink was concerned for the privacy of the boys;
> d. Boeyink was concerned with the liability of the city.

The Respondents concluded that hiring a male lifeguard would resolve all of these problems.

14. In Tollakson vs. United Community Schools, CP# 3066, ICRC CASE REPORTS, 1977-78, the Iowa Civil Rights Commission upheld its earlier decision in Sullivan v. McCoy-Stampfer's Inc., CP#'s 2690 and 2693, November 21, 1977, where it adopted the following definition of business necessity:

> The applicable test is not merely whether there exists a business purpose for adhering to a challenged practice; the test is whether there exists an over riding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any discriminatory impact: the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a less differential impact on affected classes.

15. In Polk County Juvenile Home v. ICRC, 322 N.W. 2d 913 (Iowa Ct. App. 1962), the Court affirmed the Commission's decision in that there was not substantial evidence that a male sex BFOQ exception was applicable for the position of child care worker with boys at the county juvenile home. In that case there were 13 positions and it was concluded that 5 could be male and 5 female. Furthermore, since the position included supervising residents in showers, a limited number of "male only" and "female only" positions were justified to protect the privacy interests of the residents. It was, therefore, concluded that the remaining 3 positions could have been filled with either sex without sacrificing administrative efficiency, internal security, or safety and without infringing upon the residents privacy interests. The Court concluded that since the bona fide occupational qualification exception is contrary to the premise of the state Civil Rights Act, it must be strictly construed and to justify the exception there must be no less restrictive alternative reasonably available to the employer.

16. 161 Iowa Admin. Code §8.47, provides as follows:

> The bona fide occupational qualification exception as to sex is strictly and narrowly construed. Labels - "men's jobs" and "women's jobs" - tend to unnecessarily deny employment opportunities to one sex or the other.

17. The claim that no further complaints were received after hiring a male is not relevant to the BFOQ issue. If an employer hired a white male in preference to a more qualified black male, would it make any difference if the white male then did a good job? The discriminatory act still occurred.

18. The argument that the female lifeguards were uncomfortable with monitoring the problems in the boys' shower room is not well founded. The fact is that one Park Board member had the *impression" that Eason, one female lifeguard, was uncomfortable with the monitoring situation. Other testimony indicated that she did, in fact, perform those duties as head lifeguard. The other fact is that Kellen was not asked whether or not she was uncomfortable with the monitoring situation or even if she had experience in handling the problems. In fact, she testified that she did not consider such monitoring a major concern. To assume that all females would be uncomfortable monitoring behavior in the boys' shower room is unacceptable paternalism and is not a basis for a BFOQ.

19. The burden of proving that all or substantially all females would be unable safely and efficiently to perform the duties of the position has not been met. The facts show that an all female staff had performed the duties of the job for the past several years.

20. As in Gunter, the BFOQ defense is not permitted on the right to privacy in this case. The duties of lifeguard at the Alton pool essentially involve the safety of the swimmers in and around the pool and teaching swimming skills. The major concern on discipline according to the rules was not allowing smoking. The occasional "horseplay" in the showers was a minor part of the duties of lifeguards. Females could perform the majority of the required duties. Kellen was qualified for the job and had experience in controlling the occasional "horseplay" in the boys' shower area.

It is also noted that the pool manager's duties specifically included taking care of the restrooms. The pool manager was male. It is further noted that two of the substitute lifeguards were male and that there was no specific order in winch the substitutes were called in. They could have been used in the times of most probability for problems. The fact is that the Park Board had not even studied when the problems occurred to determine such needs. Gender is not considered a BFOQ for the essential purpose of the job of teaching swimming and acting as lifeguard at the City pool.

21. Was there an overriding legitimate business purpose such that hiring a male was necessary to the safe and efficient operation of the pool? A reason sufficiently compelling to override any discriminatory impact? The City had not been sued for violation of right to privacy or injury to the smaller boys. The City had not been threatened to be sued for violation of right to privacy or injury to the smaller boys. The fact is that there hadn't even been any complaints that female guards entered the shower facilities. Even granted a legitimate concern for the problems occurring in the boys' shower area, to prove a BFOQ there must be available no acceptable alternative policies or practices winch would better accomplish the business purpose or accomplish it equally well with a less differential impact on affected classes, in this case females. It is concluded that there were acceptable alternatives. There could have been rules controlling the kind of problems which occurred in the boys' restroom. There could have been provisions for prohibiting boys from being admitted if the problems recurred. The pool manager, the City Clerk, and the lifeguards knew who the boys were who were causing the problems. The parents could have been informed of the unacceptable behavior. The pool manager could have scheduled himself to be present during the times the problems usually occurred or the Park Board could have ordered him to be present during those times. The female lifeguards could have been given more guidance and support in how to control the problems when they occurred. The Park Board made no attempt to identify the specifies of the problem or resolve the problem in any way except to decide that a male lifeguard was necessary. Even that decision was tentative in that if Punt had not succeeded in getting his WSI, they would have hired Kellen, a female.

It is concluded that Respondents have failed to prove their BFOQ defense.

REMEDIES

When an unfair or discriminatory practice is determined, Code section 601A.15(8) (1983), requires an order that a Respondent cease and desist from the practice. Such an order should be made.

Iowa Code section 601A.15(8) (1983) further requires a respondent to take remedial action necessary to carry out the purposes of Chapter 601A. Remedial action under Iowa Code Chapter 601A attempts to "make whole" a victim of discrimination and permits an award of damages to restore the victim to the position she would have been in had the discriminatory act not occurred. See Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W. 2d 162, 171 (Iowa 1982).

Complainant Kellen should have been hired as full time lifeguard in 1983 and should, therefore, receive the difference between what she would have earned and her actual earnings.

If Complainant had been hired in 1983, she would have been able to apply and work in 1984 also. The fact that she applied and worked part-time in 1984 attests to her availability, therefore, she should receive the difference between what she would have earned as a full time lifeguard in 1984 and her actual earnings. Counsel are ordered to submit a stipulation on the amount of back pay based on the above conclusions. That stipulation is due within 10 days of the issuance of this proposed decision.

RECOMMENDED DECISION AND ORDER

1. CITY OF ALTON (PARKS DEPT.), MAYOR, CITY COUNCIL (ALTON), and CITY OF ALTON PARK BOARD violated Iowa Code section 601A.6, in denying Laura Kellen the position of full time lifeguard in 1983.

2. IT IS ORDERED that Respondents cease and desist from unfair and discriminatory employment practices.

3. IT IS ORDERED that Respondents pay Laura Kellen back pay for the years 1983 and 1984 in an amount to be submitted by stipulation of Counsel for the parties within 10 days of the issuance of this Order.

Signed this 25th day of March 1988.

IONE G. SHADDUCK,

Hearing Officer

FINAL ORDER

ON May 6, 1988, at its regular meeting, the Iowa Civil Rights Commission reviewed the Hearing Officer's proposed decision issued on March 25, 1988 and Memorandum submitted April 20, 1988, and adopted the proposal as its own Findings of Fact, Conclusions of Law, Decision and Order.

Signed this 17th day of May, 1988.

JOHN STOKES, Chairperson

Iowa Civil Rights Commission